

**ADMINISTRATIVE APPEAL DECISION**  
**Memphis Stone & Gravel Company**  
**File No. 200113910**  
**Vicksburg District**  
**19 July 2002**

Review Officer (RO): Martha S. Chieply, U.S. Army Corps of Engineers (USACE), Mississippi Valley Division (MVD)

Appellants/Applicant: Mr. Alan Parks and Mr. Bill Kelly, Memphis Stone & Gravel Company, Memphis, Tennessee

Appellants' Representative: Dr. Tom Heineke, Heineke & Associates, Bartlett, Tennessee

Authority: Section 404 of the Clean Water Act

Receipt of Request For Appeal (RFA): 13 March 2002

Appeal Conference & Site Visit Date: 6 May 2002

Background Information: In a letter dated 18 September 2002, Mr. Bill Kelly, of Memphis Stone & Gravel Company (Appellants) requested a jurisdictional determination (JD) for a property located approximately two miles southwest of Batesville in Panola County, Mississippi. This site has been used as pasture for cattle production. The Appellants are planning to utilize the site for future gravel mining operations. A prominent stream traverses the site and is referred to in the administrative record and other documents as "NW Stream." It is also depicted on the Batesville, Mississippi USGS quadrangle maps as "Running Slough." Several smaller unnamed tributaries referred to as Ditches A, B, C, and D convey drainage to the NW Stream. Dams were constructed before 1972 as part of a National Resources Conservation Service farm pond program on the upper limits of Ditches A, C, and D to form Ponds A, B, and C, consecutively.

The MVK conducted a field investigation on 11 December 2001. In a letter dated 17 January 2002 (MVK JD letter), the MVK determined there were jurisdictional areas on the property subject to Corps of Engineers' regulation. The MVK JD letter included a map depicting the "Other Waters" of the United States, a Basis for Jurisdictional Determination form, the Combined Notification of Appeal Process (NAP)/Request For Appeal (RFA) form, and a Department of the Army permit application package.

The MVK received the Appellants' RFA on 2 March 2002, and forwarded the RFA to MVD on 13 March 2002. The RFA was received within the allotted 60-day timeline.

Information Received and Disposition During the Appeal Review:

1. Prior to the appeal conference, the MVK provided a copy of the administrative record to the RO and the Appellants. The appeal of an approved JD is limited to the information contained in the administrative record by the date of the NAP for the approved JD. The NAP for Appellants was dated 17 January 2002.
2. The RO provided the MVK and the Appellants with a list of questions to be asked in the appeal conference.
3. At the appeal conference, the Appellants provided a written response to the questions asked in the appeal conference, which was considered to be clarifying information.
4. At the appeal conference, the MVK provided a Batesville, Mississippi USGS quadrangle map dated 1982 and an Asa, Mississippi quadrangle map dated 1983. The MVK highlighted Running Slough and Running Slough Ditch.
5. All responses are found in the Memorandum For The Record for the Administrative Appeal Conference, Memphis Stone & Gravel Company, Department of the Army, File No. 200113910, dated 10 May 2002.

Copies of all clarifying information received from the Appellants and the MVK were provided to both parties.

Summary of Appeal Decision:

Appellants' Reason 1: Merit - The administrative record does not support the MVK JD that Ditch D and Pond C are waters of the United States and subject to Corps jurisdiction.

Appellants' Reason 2: Not acceptable reason for appeal - Determination that a particular activity requires a Department of the Army permit is not part of an approved JD.

Appellants' Reason 3: No Merit - The Appellants allege that the subject site does not appear to have characteristics of a wetland environment. The MVK JD did not assert that wetlands were found on the site.

Basis for Appeal as Presented by Appellants (quoted from the Appellants' RFA and presented in bold lettering):

**Appellants' Reason 1: Within the permitted area (green outline) is a large intermittent stream trending in a northwest direction. This intermittent stream is identified as NW Stream on the attached site map. Memphis Stone & Gravel Company has maintained a minimum 50 foot buffer on both sides of it and has taken measures described below to minimize impacts generated from our mining activity.**

FINDING: Merit- The administrative record does not support the MVK JD that Ditch D and Pond C are waters of the United States and subject to Corps jurisdiction.

ACTION: As detailed in the discussion, the MVK JD is remanded for reconsideration and, as appropriate, to complete a revised JD or provide additional documentation in the MVK administrative record to support its JD regarding Ditch D and Pond C.

DISCUSSION: The Appellants' initial reason for appeal did not contain a specific allegation regarding the MVK geographic JD. The RO requested additional clarification. The Appellants provided a written response, which clarified their reason for appeal:

...Memphis Stone and Gravel is not suggesting that the Corps has made an incorrect determination on this large stream (NW Stream). It is, however, suggesting that some of the other areas that the Corps determined to be waters of the United States on the property, are, in fact, not waters of the United States.

There is insufficient evidence in the administrative record to support a finding that Pond C and Ditch D are waters of the United States. There is sufficient documentation to support a finding that Pond B is a water of the United States.

During the Administrative Appeal Conference, the Appellants specifically alleged that Ponds B and C, and Ditch D are not waters of the United States. To support their allegation, the Appellants stated that the majority of Ditch D did not exhibit an Ordinary High Water (OHW) mark. Pond C is built on Ditch D. Therefore, the Appellants stated, the lack of jurisdiction for Ditch D would result in a finding that Pond C is not a water of

the United States and not regulated. The Appellants allege that the construction of the dam for Pond B occurred in non-waters of the United States (non-jurisdictional) and, as such, Pond B is not a water of the United States.

The MVK Basis of JD form, dated 21 June 2001, states:

A. Property referenced in the attached correspondence contains waters of the United States based on:

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The presence of one or more tributaries (stream channels, man-made conveyances, lakes, ponds, rivers, etc.) that eventually drain or flow into navigable or interstate waters. Includes property below the ordinary high water mark of the tributary. (Footnote 3- the lateral limits of waters of the U.S. are/or have been determined by the high tide line, ordinary high water mark, and/or the limit of adjacent wetlands.)

In the finding above, the administrative record contains sufficient evidence that the subject property includes a tributary (Running Slough, referenced by the Appellants as NW Stream) and Running Slough Ditch, which eventually drains or flows into the Little Tallahatchie River, a navigable water of the United States. Evidence in the administrative record (two USGS quadrangle maps and an aerial photograph) shows the tributary connection, which provides the basis of jurisdiction.

Although the MVK's record establishes a basis for jurisdiction, that jurisdiction has limits. The limit of Corps jurisdiction in non-tidal waters of the United States is defined at 33 C.F.R. 328.4 (c)(1) as:

In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark.

The MVK stated in the appeals conference that during the course of its investigation a shelving line was observed where vegetation started or stopped. This shelving constituted an OHW mark and was observed by the RO during the appeal site visit along Ditches A, B and C. The Appellants allege that portions of Ditch C from the Pond B dam and continuing upstream are not waters of the United States. Pond B is built on Ditch C. The Appellants allege that the absence of an OHW mark along Ditch C upstream from the Pond B dam results in a finding that Pond B is not a water of the United States. The MVK maintains that there

is evidence of an OHW mark extending upstream from Pond B and ending at a culverted road crossing. Based on the site investigation, there is sufficient evidence of an OHW mark upstream from Pond B to support the MVK's JD that Pond B is a water of the United States. An OHW mark was observed immediately downstream from the culverted road crossing and toward the Pond B. An OHW mark was not evident upstream of the culverted road crossing.

Walking along Ditch D to its confluence with the NW Stream, the RO did not observe any shelving or evident OHW mark along Ditch D to support the MVK's JD that Ditch D is a water of the United States. The majority of Ditch D consisted of a low area less than two feet in depth with the bottom being completely covered with grasses such as fescue and other vegetation. Pond C is built on Ditch D. Because Ditch D is outside the limits of Corps jurisdiction, there is no basis for finding that Pond C is a water of the United States.

**Appellants' Reason 2:** The farm ponds within the permitted area (identified as Ponds A, B, and C) were constructed for both erosion control and livestock watering. For this reason, Memphis Stone & Gravel Company requests to use these basins to protect NW Stream from sedimentation caused by storm water runoff. Additionally, Pond A will be enlarged as necessary to accommodate the drainage area. Please see the attached photos for an illustration of these areas. Memphis Stone & Gravel Company believes that using these ponds in this manner should not require a 404 permit.

FINDING: Not an acceptable reason for appeal.

ACTION: No action is required.

DISCUSSION: An approved JD does not determine that a particular activity requires a Department of the Army permit.

33 CFR 331.2 defines "jurisdiction determination" as:

[A] written Corps determination that a wetland and /or waterbody is subject to regulatory jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. 1344) . . . .

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[S]uch geographic JDs may include, but are not limited to, one or more of the following

determinations: the presence of or absence of wetlands; the location(s) of the wetland boundary, ordinary high water mark, mean high water mark, and/or high tide line; interstate commerce nexus for isolated waters; and adjacency of wetlands to other waters of the United States. . . .

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JD's do not include determinations that a particular activity requires a DA permit.

A JD is a determination that a site is subject to Corps regulatory authority under the CWA. By definition, the JD does not include a determination that a particular activity requires a permit.

The Appellants allege their proposed activity does not require a permit. Such a determination is not part of a JD. Therefore this is not an acceptable basis for appeal.

**Appellants' Reason 3: The drains that convey precipitation runoff and overflow from the subject pond to NW Stream will continue to serve as conveyances for storm water. These drains are identified as Ditch A, B, C, and D on the site map. Ditch A will be developed into a sedimentation basin (i.e., enlarged Pond A). As photographs numbered 3, 4, 5, 6, and 8 illustrate, these drains do not appear to have the characteristics of a wetland environment.**

FINDING: This reason for appeal does not have merit.

ACTION: No action required. In the discussion above at Appellant's Reason For Appeal 1, I found that there was insufficient evidence to support a finding that Ditch D was a water of the United States. Therefore I will consider only ditches A, B and C in the present discussion.

DISCUSSION: The Appellants allege that the subject site does not appear to have characteristics of a wetland environment. However the MVK did not base its jurisdictional determination on the presence of wetlands. Jurisdictional areas subject to Corps of Engineers' regulation include both "wetlands" and "waters of the United States." The MVK JD letter, which included a map, determined there were jurisdictional areas on the property. These areas were depicted as "Other Waters" of the United States with no reference to the existence of wetlands.

No wetlands were depicted on the MVK JD map or noted in the Basis of JD form. The MVK completed a site investigation and documented its findings by completing two routine wetland determination data forms. At the appeal site visit, the RO corroborated the MVK's findings that no wetlands were identified.

A minor inconsistency was found between the MVK JD transmittal letter and the Basis for JD form that may have made it difficult for the Appellant to understand the basis of regulatory jurisdiction regarding this property. The MVK letter dated 17 January 2002, stated:

*The approximate extent of wetlands and other waters of the United States within the boundary of the property described in your letter is depicted on the enclosed map (enclosure 1).*

The MVK maintains that the referenced statement is standard for MVK JD notifications. The statement, "wetlands and other waters" is accurate because it notifies the applicant of the extent to which wetlands and other waters of the United States are identified in the project area. The MVK acknowledged that using "and/or" might have been clearer to the Appellants.

I have determined that this inconsistency constitutes a harmless procedural error. Because the MVK did not base its JD on the presence of wetlands, the reason for appeal lacks merit.

CONCLUSION: For the reasons stated above, I conclude that the Appellants' Reason 2 is an unacceptable reason for appeal and Reason 3 does not have merit. Reason 1 has merit. I am remanding the JD to the MVK Engineer to complete a revised JD or provide additional documentation in the MVK administrative record to support its JD regarding Ditch D and Pond C.

/signed/  
RICHARD B. JENKINS  
Colonel, Corps of Engineers  
Acting Division Engineer